

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

NORMAN GEORGE REIDEL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court did not deliver a written opinion. Its oral explanation of its ruling is set out in Appendix A, *infra*, pp. 7-13.

JURISDICTION

On June 8, 1970, the United States District Court for the Central District of California entered an order (App. B, *infra*, p. 15) dismissing a three-count indictment based on 18 U.S.C. 1461, which prohibits the mailing of obscene materials. The court dismissed the indictment because in its view Section 1461 is unconstitutional as applied to the mailing of material solicited from the sender by adults. A notice of appeal to this Court was filed in the district court on July 8,

(1)

1970 (App. C, *infra*, pp. 17-18) This Court has jurisdiction under 18 U.S.C. 3731 to review on direct appeal from a district court the dismissal of an indictment based upon the invalidity of the statute on which the indictment is founded. See, *e.g.*, *United States v. Spector*, 343 U.S. 169; *United States v. Petrillo*, 332 U.S. 1.

QUESTION PRESENTED

Whether the federal statute prohibiting the mailing of obscene matter may constitutionally be applied to one who uses the mails for commercial distribution of obscene material to willing individual buyers who state that they are adults.

STATUTE INVOLVED

18 U.S.C. 1461 provides in pertinent part:

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and * * * is declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both,

for the first such offense, and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. * * *

STATEMENT

On February 17, 1970, an advertisement appeared in the "East Village Other" (an "underground" newspaper) which stated:

IMPORTED PORNOGRAPHY—Learn the true facts before sending money abroad. Send \$1.00 for our fully illustrated booklet. You must be 21 years of age and so state. Normax Press, P.O. 989, Fontana, California, 92335.

A postal inspector, stating that he was an adult, sent \$1.00 in response to this advertisement and received a booklet entitled "The True Facts about Imported Pornography."¹ Relying upon this booklet and information acquired by independent investigation, the postal inspector obtained a search warrant for appellee's premises. Execution of this warrant disclosed a number of revised editions of the booklet as well as four original editions, two of which were in mailing envelopes which had been returned to sender marked "undelivered." These and other items were seized. As a result of the initial "test buy" and the search and seizure which followed, an indictment in three counts was returned against appellee charging violations of 18 U.S.C. 1461. Counts 1 and 2 were based upon the two booklets found on appellee's premises and charged mailings to the named addressees; count 3 charged the mailing of the booklet to the postal inspector.

¹One copy of this booklet has been lodged with the Clerk of this Court.

Appellee moved to dismiss the indictment. At the hearing on the motion, the district court stated that it would assume the booklets in question to be pornographic (Tr. 11, 29-30);² the government stipulated that the booklet which was the subject of count 3 had been ordered by a postal inspector who was an adult and that it had no evidence that the booklets which were the subjects of counts 1 and 2 had not been solicited by adults (Tr. 15-21).³ The court then dismissed the indictment. In explaining its reasons for this action (Appendix A, *infra*, pp. 7-12), the court relied on *Stanley v. Georgia*, 394 U.S. 557. Notwithstanding the express disavowal in *Stanley* (*id.* at 568) of any intent to impair the holding in *Roth v. United States*, 354 U.S. 476 (which sustained a conviction under the precise statute here in issue), the court found it a necessary consequence of *Stanley* that individuals cannot be restricted from distributing obscene material commercially through the mails to adults who solicit such material.

THE QUESTION IS SUBSTANTIAL

This case is another in a series involving the question of the impact of *Stanley v. Georgia*, *supra*, on the

² "Tr." refers to the transcript of the hearing on the motion to dismiss. We are lodging a copy of this transcript with the Clerk of this Court in connection with the present Jurisdictional Statement. That part of the transcript which contains the court's ruling on the motion to dismiss is set forth in Appendix A, *infra*.

³ The court indicated thereafter that the stipulation would be considered as having been made as "an amendment to the indictment in response to a bill of particulars," a treatment in which counsel for both sides concurred (Tr. 27-28). Compare *United States v. Fruehauf*, 365 U.S. 146, 157.

ruling of *Roth v. United States*, *supra*. Like *Byrne v. Karalexis*, set for reargument, No. 83, this Term, and *United States v. Thirty-seven (37) Photographs*, pending on appeal, No. 133, this Term, the decision below involves commercial distribution of obscene material.*

The views of the United States concerning the impact of *Stanley* in the circumstances of commercial distribution are set forth in our *amicus* Brief in *Byrne* and there is no reason to repeat those views fully here. Briefly, our position is that *Stanley* held only that the States lack power to punish or bar possession of obscene material "in the privacy of a person's own home," 394 U.S. at 564, and did not decide that private persons have a right to receive—much less commercially distribute through the mails—matter which is obscene under the *Roth* standards. And see *Gable v. Jenkins*, 397 U.S. 592. This case shares that issue with the several others in which it may be presented this Term.

Because this case is in direct conflict with *Roth*—which upheld the constitutionality of Section 1461 in circumstances virtually identical to these[†]—summary affirmance in advance of a resolution of the *Stanley* issues would not be anticipated. There is the question, however, whether it is necessary to hear oral argu-

*We emphasize that the mailing here was by a commercial operator and not by a private individual for personal, non-commercial purposes. Compare *Redmond v. United States*, 384 U.S. 264.

[†]Two of the four counts on which *Roth* was convicted were based on purchases by a postal inspector. Petition for a Writ of Certiorari, No. 582, O.T. 1956, p. 39. No question concerning the adult status of the inspector was raised in *Roth*, however.

ment in this case if argument is scheduled for the cases earlier filed. We believe briefing and argument might prove useful. The other cases to which the United States is a party involve customs matters, and may in part turn on consideration of the government's extraordinary authority in that sphere. See *Carroll v. United States*, 267 U.S. 132. Use of the mails (so far as this case is concerned) is a wholly domestic matter, to which it is conceivable a different rule might apply. Appellee's argument is, in effect, a fresh assault upon the government's enforcement methods under the statute—methods which have been upheld as dictated by the circumstances of the postal trade in obscenity. *Rosen v. United States*, 161 U.S. 29, 42. If these methods are now to be repudiated, it ought only to be after full argument in this Court.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should note probable jurisdiction.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
ROGER A. PAULEY,
Attorneys.

AUGUST 1970.

* Appellee may seek to rely on the dismissal of several counts of an indictment in a similar case, *United States v. Lethe*, Crim. No. S-884, E.D. Cal. Other counts were not dismissed in that case, however, and the government preferred to go immediately to trial of the remaining counts rather than await the disposition of an appeal to this Court.

APPENDIX A

Original

In the United States District Court, Central District
of California

Honorable Harry Pregerson, *Judge Presiding*

No. 5845-HP-Criminal

UNITED STATES OF AMERICA, PLAINTIFF

v.

NORMAN GEORGE REIDEL, DEFENDANT

Reporter's Transcript of Proceedings

Los Angeles, California

Monday, June 8, 1970

SAMUEL GOLDSTEIN, OFFICIAL REPORTER, UNITED STATES
DISTRICT COURT, LOS ANGELES, CALIFORNIA 90012,
PHONE: 622-1678 AND 622-2903

APPEARANCES

For the Plaintiff: ROBERT L. MEYER, *United States Attorney*, By: EDWARD WALLIN, *Assistant United States Attorney*, and KENT STEELE, *Assistant United States Attorney*, 1200 U.S. Court House, Los Angeles, California 90012.

For the Defendant: ROBERT C. McDANIEL, Esq.

[Tr. 21] * * * * *

The COURT. Well, I think on that basis, then, at least, I feel that there is enough for me to make a ruling on this matter. My ruling can be examined by a higher court, perhaps.

I have always found this area, pornography, obscenity, or what is or what isn't obscene, a very difficult area for me to move in for a number of reasons. I don't think that that is any novel statement. It has been stated by lawyers and by judges on many occasions. I, personally, have a dislike and a distaste for the whole area, and I certainly have very strong feelings against this kind of literature and this kind of printing. On the other hand, [Tr. 22] that feeling and viewpoint of mine is also in a sense counter-balanced by a strong feeling of the right of an individual to his own privacy and for an adult to make these decisions on his own without being told by his Government what he can see or what he can't see, or what he can read or what he can't read, what he can feel or what he can't feel. I think it is an area that certainly the Supreme Court has been struggling with for many years and probably will be struggling with for many years in the future.

I went over and read *Stanley v. Georgia* very carefully last night, and I am quoting from Volume 89 of the Supreme Court Reporter, page 1247, the court speaking through Mr. Justice Marshall stated:

"It is now well established that the constitution protects the right to receive information and ideas. 'This freedom (of speech and press) * * * necessarily protects the right to receive * * *'"

Then there are citations; the *Griswold* case, *Lamont*. Then continuing:

"This right to receive information and ideas, regardless of their social worth * * * is fundamental to our free society. Moreover, in the context of this case—a [Tr. 23] prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right

takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."

Then they go on and quote Brandeis' dissent in *Olmstead v. The United States*, where he talks about the right to be let alone and describes that as the most comprehensive of rights and the right most valued by civilized man.

It would seem to me, anyway, that if a person has the right to receive and possess this material, then someone must have the right to deliver it to him. This is basically the thought that was expressed in *Karalex v. Byrne*, 306 F. Supp. 1363, a 1969 Massachusetts case, District Court in Massachusetts.

So it would be my conclusion that where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in this case is solicited by adults, there is no valid governmental interest that I can see that would justify a criminal prosecution for distributing this material, and I would therefore, of course, go along with Judge MacBride in the case of *United [Tr. 24] States v. Lethe*, decided by him on April 29, 1970, Eastern District of California. So this court is, therefore, going to rule that this particular prosecution that is now before it under 18 U.S.C., Section 1461, runs afoul of the First and Fourteenth Amendments. On that basis the motion to dismiss is granted.

Because the court has ruled that the defendant may not be prosecuted for mailing this obscene material to requesting adult addressees, the court need not pass

on the other constitutional questions and need not pass on this matter of requirement of an adversary hearing.

* * * * *

[Tr. 26] * * * * *

Mr. McDANIEL. Could I ask one question, your Honor?

Is the effect of your ruling any impugning of the underlying constitutionality?

The COURT. I thought I made it clear that what I am saying is as far as this particular case is concerned that that Section 1461 runs afoul of the First and Fourteenth Amendments. It is a very narrow ruling.

Mr. McDANIEL. Just one further comment—

The COURT. Based on the fact that you have a solicitation by an adult. I think that is a far cry from a mass mailing and mass distribution, which I personally find [Tr. 27] to be highly offensive.

Mr. McDANIEL. Thank you, your Honor.

The COURT. In this situation here if the addressee is an adult, and this is what that person wants, I think that the cases that I have cited and the principles that I have referred to certainly give him that right. That is his own personal decision.

Mr. WALLIN. Your Honor, is it the court's decision that in order to well plead a charge under this statute the Government must plead and be prepared to prove that the item was either sent to a juvenile or sent unsolicited through the mail?

The COURT. Well, I will say no more, Mr. Wallin, other than indicate that my ruling is based on the prosecution in this particular case, that it involves a situation where the item is sent out in response to a solicitation by an adult. I will just leave it at that.

Mr. WALLIN. May it be stipulated that the Government's statements on the record here today, that the item in Count Three was solicited and that the Government has no evidence either way on Counts One and Two, be deemed to be a part of a bill of particulars supplied by direction of the court to amplify the indictment?

The COURT. Is there any objection to that?

Mr. McDANIEL. I don't even understand this, [Tr. 28] so I won't say anything.

Mr. WALLIN. I am trying to think ahead, your Honor. My point is I am trying to make the record clear that the court's decision is based on the fact of solicitation or no proof of lack of solicitation, at least, of these materials, and on the fact that that has been considered as part of the bill of particulars to amplify this indictment.

The COURT. In my decision I talk about the prosecution in this particular case. As far as this court is concerned, based on what I heard here, the stipulation as far as Count Three and the stipulation as far as the other two counts are concerned, that we are dealing here with a situation where an adult solicits the material, the material was mailed in response to a solicitation by an adult. I don't see where there is any problem or should be any problem if that is considered an amendment to the indictment in response to a bill of particulars.

Mr. WALLIN. That is what I wanted the court to say. Thank you.

* * * * *

[Tr. 29]

* * * * *

Mr. WALLIN. May it also be assumed for purposes of this hearing that the court has examined the material which forms the underlying basis for this indictment?

ment and has found it to be obscene as that term is defined by the Supreme Court?

The COURT. I haven't really made that finding. We are all assuming that it is. We are assuming that it is. I think I brought that out.

Mr. McDANIEL. Just in terms of the language of the motion that was before the court, we didn't go into the issue of obscenity by the motion. That is technically where it stands.

The COURT. Yes. If you went into that issue you might have other problems, I am sure.

Mr. STEELE. In the argument, though, we did agree to that, in the argument on the motion.

The COURT. In the argument we did agree on that.

Mr. McDANIEL. All three of you gentlemen [Tr. 30] agreed. I never said anything at that point, I want the record to be clear on that. But technically it is an arguendo situation.

Thank you, your Honor.

The COURT. That is the underlying assumption. All right. It is after 5:00 and time to close shop, so we will recess until 9:30 tomorrow morning.

[Tr. 31] in the United States District Court, Central District of California

No. 5845-HP-Criminal

UNITED STATES OF AMERICA, PLAINTIFF

v.

NORMAN GEORGE REIDEL, DEFENDANT

Reporter's Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter for the United

States District Court for the Central District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California this 10th day of June, 1970.

Samuel Goldstein, C.S.R.

Official Reporter.

APPENDIX B

United States District Court, Central District of California

Criminal Minutes—General

Case No. 5845 Date June 8, 1970

Docket Entry: Deft appears with ret couns. Hrg defts mot to dismiss ind, ord mot granted, case dismissed, and that other pending mots are moot & need not be passed on. Fur ord that seized material be returned to deft, but that exec of this ord is stayed for 60 days. JS-3 (HP)

Present: Hon. HARRY PREGERSON, Judge

A. J. MORSCH
Deputy Clerk

SAMUEL GOLDSTEIN
Court Reporter

KENT STEEL EDWARD WALLIN
Asst. U.S. Attorney

U.S.A. v. (DEFENDANTS LISTED BELOW)

(1) NORMAN GEORGE REIDEL

4 present ___ custody ___ bond 4 O/R

(2)

___ present ___ custody ___ bond ___ O/R

(3)

___ present ___ custody ___ bond ___ O/R

(4)

___ present ___ custody ___ bond ___ O/R

ATTORNEYS FOR DEFENDANTS

(1) ROBERT C. McDANIEL

4 present ___ appointed 4 retained

(2)

___ present ___ appointed ___ retained

(3)

___ present ___ appointed ___ retained

(4)

___ present ___ appointed ___ retained

Proceedings: Hearing Defendants Motion to Dismiss, etc.

Defendant appears with retained counsel. Ordered motion to dismiss granted and that other pending motions are moot and need not be passed on. Further ordered that seized material be returned to defendant but that execution of this order is stayed for 60 days.

APPENDIX C

United States District Court, General District of
California

No. 5845-HP-CD

Filed July 8, 1970

UNITED STATES OF AMERICA, PLAINTIFF

v.

NORMAN GEORGE REIDEL, DEFENDANT

Notice of Appeal

Attorneys for Plaintiff, United States of America:
ROBERT L. MEYER, *United States Attorney*, DAVID R.
NISSEN, *Assistant U.S. Attorney, Chief Criminal Division*, J. KENT STEELE, *Assistant U.S. Attorney*, 1221
U.S. Courthouse, 312 North Spring Street, Los Angeles,
California 90012; Telephone: 688-2432.

Plaintiff, United States of America, hereby appeals
to the United States Supreme Court, under the provisions
of 18 U.S.C. § 3731, from the Judgment on the Motion
to Dismiss the Indictment entered June 8, 1970, in this case.

The attorneys for the parties and their addresses
are: For the plaintiff, United States of America, Robert
L. Meyer, United States Attorney, David R. Nissen,
Assistant U.S. Attorney, Chief Criminal Division and
J. Kent Steele, Assistant U.S. Attorney, United States
Courthouse, 312 North Spring Street, Los Angeles,
California, 90012; for the defendant, Norman

George Reidel, Robert C. McDaniel, 1680 Vine Street,
Suite 700, Los Angeles, California, 90028.

Dated: This 8th day of July, 1970.

ROBERT L. MEYER,
United States Attorney,
DAVID R. NISSEN,
Assistant U.S. Attorney,
Chief, Criminal Division,
J. Kent Steele
J. KENT STEELE,
Attorneys for Plaintiff,
United States of America.

